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No. 98-878

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 4

Proceedings below 4

Facts 6

The Abduction and Deprogramming 6

CAN's Involvement In The Deprogramming 10

REASONS WHY THE PETITION SHOULD BE DENIED 14

1. Certiorari Should Not Be Granted To Review Questions Not Properly Preserved Below, Or Which Are Essentially Factual In Nature 14

2. Petitioner's *Claiborne Hardware* Argument Is Both Factually and Legally Without Merit 15

3. CAN's Argument That 42 U.S.C. §1985(3) Precludes Respondeat Superior Liability Is Not Only Incorrect But Irrelevant, Since CAN Was Found Liable For Its Policy and Practice 20

4. This Is Not an Appropriate Case for Determining the Limits of Class-based Discriminatory Animus under §1985(3) 26

CONCLUSION 30

TABLE OF AUTHORITIES
CASES

Page

Adams v. *Pate*,
445 F.2d 105 (7th Cir. 1971) 24

Adickes v. *S.H. Kress & Co.*,
398 U.S. 144 (1970) 26

American Society of Mechanical Engineers, Inc.
v. *Hydrolevel Corp.*,
456 U.S. 556 (1982) 19

Bell v. *City of Milwaukee*,
746 F.2d 1205 (7th Cir. 1984) 24

Bray v. *Alexandria Women's Health Clinic*,
506 U.S. 263 (1993) 29

Carnegie v. *Miller*,
811 F. Supp. 907 (S.D.N.Y. 1993) 25

Colombrito v. *Kelly*,
764 F.2d 122 (2d Cir. 1985) 4, 27

Cult Awareness Network v. *Martino*,
151 F.3d 605 (7th Cir. 1998) 19

Daigle v. *Gulf State Utilities Co.*,
794 F.2d 974 (5th Cir. 1986)
cert. denied, 479 U.S. 1008 28

Deubert v. *Gulf Federal Savings Bank*,
820 F.2d 754 (5th Cir. 1987) 27

Exxon Co., U.S.A. v. *Sofec, Inc.*,
517 U.S. 830 (1996) 15

Green v. *State Bar of Texas*,
27 F.3d 1083 (5th Cir. 1994) 27

Griffin v. *Breckenridge*,
403 U.S. 88 (1971) 22, 28

Hankins v. *City of Philadelphia*,
1998 U.S. Dist. LEXIS 5101
(E.D. Penn. Apr. 9, 1998) 25

Howard v. *Topeka-Shawnee County Metropolitan Planning Comm'n*,
578 F. Supp. 534 (D. Kan. 1983) 25

Life Insurance Co. of N.A. v. *Reichardt*,
591 F.2d 499 (9th Cir. 1979) 27, 28-29

Luke v. *Abbott*,
954 F. Supp. 202 (C.D. Cal. 1997) 25

Meza v. *Lee*,
669 F. Supp. 325 (D. Nev. 1987) 25

Monell v. *Department of Social Services*,
436 U.S. 658 (1978) 21, 22, 23

NAACP v. *Claiborne Hardware Co.*,
458 U.S. 886 (1982) ..... *passim*

Owens v. *Haas*,
601 F.2d 1242 (2d Cir.)
cert. denied, 444 U.S. 980 (1979) 24

Rayborn v. *Mississippi State Board of Dental Examiners*,
776 F.2d 530 (5th Cir. 1985) 27, 28

Taylor v. *Gilmartin*,
686 F.2d 1346 (10th Cir. 1982)
cert. denied, 459 U.S. 447 (1983) 27

United Brotherhood of Carpenters v. *Scott*,
463 U.S. 825 (1983) 28

Vazquez v. *City of Reno*,
461 F. Supp. 1098 (D. Nev. 1978) 25

Ward v. *Connor*,
657 F.2d 45 (4th Cir. 1981)
cert. denied, 455 U.S. 907 (1982) 27

Westinghouse Broadcasting Co., v. *Dukakis*,
409 F. Supp. 895 (D. Mass. 1976) 25

Word of Faith World Outreach Center Church, Inc. v. *Sawyer*,
90 F.3d 118 (5th Cir. 1996) 26, 27, 28

STATUTES

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1985(3) ..... *passim*

INTRODUCTION

The petition presents questions wholly inappropriate for review by this Court on writ of certiorari, for two critical threshold reasons: (1) not one of the three questions presented were raised or preserved before the district court, and the third question was not even raised on appeal, until the petition for rehearing *en banc*; (2) with respect to the first two questions presented, the petition ultimately asks this Court to review *the facts* of this case in the face not only of the jury's verdict, but also of explicit findings by the district court (on a motion for new trial) and the court of appeals. In addition, petitioner grossly misstates the trial record below, in utter disregard of the specific findings of the district court and court of appeals, and fails to raise a compelling legal question requiring this Court's review.

Thus, in question 1, petitioner, the Cult Awareness Network ("CAN"), argues that under this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), petitioner should not have been liable for its agent's acts unless it "authorized, had knowledge of or ratified the unlawful act upon which liability is based." Pet. at i, question 1. Unfortunately, petitioner never raised this issue before the district court, either through a motion, a requested jury instruction, an evidentiary objection, or a motion for new trial. When petitioner belatedly attempted to raise the issue on appeal, the court of appeals limited its review to whether there was sufficient evidence to show that CAN was "directly linked" to the tortious acts of its agent, Shirley Landa (Pet. at A-12), which the Court readily found to be the case. Indeed, the district court, in upholding the punitive damage award, dispositively had found that "there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN" (Pet. at

D-6), the very standard petitioner urges as appropriate under *Claiborne Hardware*. Thus petitioner's "*Claiborne Hardware*" argument, even if legally sound, amounts to an attack on the *factual* findings of the jury, the district court, and the court of appeals, hardly an appropriate basis for *certiorari* review.

The same is true with petitioner's question 2, in which petitioner asks whether 42 U.S.C. §1985(3) "require[s] the personal and direct involvement of defendant" in the acts giving rise to liability. Once again, petitioner did not raise this issue in the district court, and thus cannot complain that the district court did not instruct the jury on the issue. Once again, the court of appeals reviewed the record and found substantial evidence that CAN's agent "acted in accordance with CAN's practice of referring people to involuntary deprogrammers," (Pet. at A-14), affirming the district court's finding that CAN "authorized or ratified" Landa's acts (Pet. at D-6) and that "the reprehensibility of CAN's conduct goes far to justify the amount of the award." Pet. at D-7. Once again, CAN inappropriately asks this Court to review the factual and credibility findings of the jury, as confirmed by the district court[1/] and affirmed by the court of appeals.

Third, CAN did not preserve its question 3, "Can a 42

1/ As District Judge Coughenour commented in his order denying CAN's post-trial motions, "the main support for the CAN's argument that Ms. Landa was acting for another organization [and not on behalf of CAN] comes from Landa herself. Given the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony." Pet. at D-4.

U.S.C. §1985(3) claim be based on alleged animus against religion," before the district court, and did not even raise it on its appeal to the Ninth Circuit, until after that court had issued its opinion and judgment affirming the judgment of the district court. Only in its petition for rehearing *en banc* did petitioner decide to raise the question, which neither the *en banc* majority nor dissent deigned to address. Neither should this Court.

Finally, as is evident from what we already have said, petitioner's description of the factual record of this case is highly selective, and is directly contrary to the findings of the district court and the court of appeals. Thus CAN's statement that the violent deprogramming at issue in this case "was one of which CAN had no knowledge . . . and . . . was not undertaken even under the apparent authority or involvement of CAN" (Pet. at 8), was expressly rejected by the district court: "CAN's attempt to distance itself from Ms. Landa's actions and Mr. Scott's deprogramming . . . belies the great weight of the evidence." Pet at D-3. Petitioner's assertion that the violent deprogramming "was contrary to CAN policy" (Pet. at 8) is negated by the findings of the district court, which found that CAN "authorized or ratified" Landa's acts (Pet. at D-6), and the court of appeals: "Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers." Pet. at A-14.

In short, the "evidence" that CAN selectively recites in its petition was sharply controverted at trial, was disbelieved by the jury, was found to be incredible by the district judge, and was rejected by both the district judge and the court of appeals in reviewing the verdict. Indeed, the petition in this case is but a further manifestation of what the district court described as CAN's "seeming incapability of appreciating the maliciousness of [its] conduct towards Mr.

Scott." Pet. at D-11. Further review by this Court is both unnecessary and inappropriate.

STATEMENT OF THE CASE

Proceedings below

After a six day jury trial, respondent Jason Scott ("Scott") won a judgment against four defendants, including petitioner CAN for conspiring to violently abduct and "deprogram"[2/] him when he was eighteen years old. Defendants' purpose was to force Scott to renounce his affiliation with the Life Tabernacle Church, a Pentecostal congregation.

CAN barely put on a defense at trial and most of the testimony elicited from CAN's representatives came out during plaintiff's case. At no time during the trial did CAN argue or seek a jury instruction that it could be found liable if and only if Landa acted pursuant to CAN's policy, or only if CAN directed, ratified, or directed Landa's acts. Rather, CAN's trial strategy was to deemphasize such issues, to argue that Landa had no connection to CAN *at all*, and to present little in the way of defense.

It did not work. The jury returned a verdict in favor of Scott under three claims: (1) conspiracy to violate civil rights under 42 U.S.C. §1985; (2) negligence; and (3)

2/ Deprogramming occurs when, at the request of a parent or close relative, a person known as a deprogrammer seizes a member of a religious sect, holds him against his will and subjects him to mental, emotional, and even physical pressures until he renounces his religious beliefs. *Colombrito* v. *Kelly*, 764 F.2d 122, 125 n.1 (2d Cir. 1985).

outrage. The jury awarded Scott compensatory damages totaling $875,000 and punitive damages against four defendants totaling $4,000,000. The jury allocated to CAN 10% of the liability under the negligence claim and found CAN liable for conspiracy to violate Scott's civil rights, for which the jury awarded Scott $1,000,000 in punitive damages against CAN. The jury did not find CAN liable for outrage. The judge denied CAN's post trial motions for judgment as a matter of law or a new trial, holding that the great weight of the evidence supported Scott's claims that Landa acted as CAN's agent, that CAN authorized or ratified Landa's tortious acts, and that "the reprehensibility of CAN's conduct goes far to justify the amount of the award." Pet. at D-7.

CAN appealed. For the first time it argued that under *Claiborne Hardware*, the First Amendment precluded CAN's liability for Scott's deprogramming. CAN contended the facts presented at trial were insufficient to demonstrate authorization by or knowledge on the part of CAN of the attempted deprogramming. Also for the first time in the action, CAN argued on appeal that 42 U.S.C. §1985(3) did not permit respondeat superior liability for a private civil rights conspiracy. CAN argued that there was no evidence before the jury establishing CAN's direct involvement in the deprogramming.

The court of appeals rejected CAN's arguments after an independent review of the record below. The court noted that while,"[i]n *Claiborne*, the evidence did not tie the NAACP to the purportedly illegal acts of its representative; here, CAN has been directly linked to the acts of its agent, Landa." Pet. at A-12. In response to CAN's argument concerning respondeat superior liability under §1985(3), the court held that, "[u]nder either traditional principles of

respondeat superior or 'policy and practice' principles, CAN would be liable. Landa acted as CAN's agent, and Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers." Pet. at A-14. Judge Schwarzer dissented.

CAN's Petition For Rehearing And Suggestion For Rehearing En Banc was denied. Judge Schroeder, a member of the original panel, wrote a concurrence noting, "the evidence was sufficient to enable the jury to find that Landa was acting on behalf of CAN and no other organization when she referred Tonkin to Ross." Pet. at B-2. In dissent, Judge Kozinski wrote that the decision violated *Claiborne Hardware* because, he contended, there was no evidence that CAN approved or authorized the acts of Landa. Judge Kozinski evidently was unaware of the district court's specific findings that CAN in fact authorized and ratified that conduct, or of the substantial evidence that CAN supported illegal deprogramming and that CAN's purported policy against illegal deprogramming was a sham.

Facts

The Abduction and Deprogramming

Scott's mother, Kathy Tonkin, arranged for his abduction and deprogramming after contacting the Cult Awareness Network's official "contact person" for Washington State, Shirley Landa. Scott, who was eighteen, and two of his younger brothers, who were minors, continued to be members of the Life Tabernacle Church, a Christian congregation affiliated with the United Pentecostal Church International, even after Tonkin had left the church. Tonkin learned of Landa through a local "hot line" on which

Landa was listed as a resource regarding cults. Although she had no information concerning the Life Tabernacle Church or its pastor, Landa advised Tonkin that her children were the victims of "cult brainwashing" and that they had to be deprogrammed. Landa told Tonkin that she was "one of the co-founders of the Cult Awareness Network."

Landa convinced Tonkin to retain Rick Ross for the deprogramming of Tonkin's children. Landa reported that Ross was "very well known in [his] business and w[as] very good and had a high success rate." Landa knew that Ross used violent deprogramming techniques because she had watched a videotape of the television show *48 Hours* which depicted Ross forcibly deprogramming a teenage boy.

Based on Landa's referral, Tonkin contacted Ross. Ross agreed with Landa's conclusion that Tonkin's children were "brainwashed" and needed to be "deprogrammed." Ross proposed that the two minor boys be deprogrammed first, since deprogramming Scott, an adult, presented a "more complicated legal situation." Immediately after speaking to Ross, Tonkin called Landa and told her a deal had been struck with Ross and informed her of the deprogramming arrangements. Tonkin also telephoned CAN.[3/]

The deprogramming of Scott's two younger brothers lasted for four days. After the deprogramming, the younger brothers left the Life Tabernacle Church. Shortly thereafter, one of the younger brothers gave Scott printed material from the Cult Awareness Network that he had received at the deprogramming.

[3/] Although at trial Tonkin denied contacting CAN directly, her testimony was impeached by her earlier deposition testimony in which she admitted that she, "made a phone call" to CAN.

During the deprogramming of the younger boys, Landa and her daughter, Susan Landa, an attorney, went to the house where the boys were held. Landa and her daughter talked to Tonkin regarding the planned deprogramming of Scott, and told Tonkin that she had no legal remedy because Scott was eighteen years old.[4/] After the deprogramming of the younger boys, the deprogrammers visited with Landa at her house.

Several weeks later, the abduction and attempted deprogramming of Scott took place. Scott was tackled, bound, and carried into a van. Ross and his men then drove Scott for several hours to an isolated house where he was forced into a room that had been specially prepared for his captivity. Thick nylon webbing had been installed over the windows to prevent his escape. Scott's shoes were confiscated.

Scott demanded that he be permitted to leave and asked Ross if he was going to try to change his mind against his will. Ross responded, "Yeah, that's what I'm paid to do." Scott threatened the kidnappers with prosecution. Ross laughed at him, stating, "You're not going anywhere and if you give me any problems, I'm going to handcuff you to the

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4/ Petitioner describes the deprogramming of Scott's brothers with the antiseptic phrase "a legal and successful effort." Pet. at 5. Respondent submits that a forced kidnapping, abduction, repeated assault and battery, and imprisonment for four days of a sixteen year old "minor," against his will, for the purpose of coercing him to abandon his religious beliefs, is not rendered "legal" just because his mother is one of the co-conspirators. While parents may attempt to instruct their children on moral and religious matters, they are not free to literally physically beat them into submission.

bed frame, and its going to be more uncomfortable than the ride over here."

Ross spent hours degrading Scott's methods of worship, the doctrinal beliefs of his Church, and his beliefs in God, the Bible, salvation, holiness and baptism. These verbal assaults continued until late into the night. When Scott was finally permitted to sleep, a guard slept in front of each of the room's two doors to prevent escape. When Scott went to the bathroom, at least one of the deprogrammers accompanied him. Scott was forced to watch a succession of videotapes as part of the deprogramming. Ross called Scott names, belittled his girlfriend, his pastor, and his faith. Scott was told he would not be free until the deprogramming was concluded.

The purpose of the deprogramming was to induce Scott to renounce and leave the Life Tabernacle Church. In correspondence to CAN, Ross had previously derided "holy rollers" and "bible bangers." A second purpose was to prevent Scott from leaving the country to become a missionary. In furtherance of the conspiracy, the deprogrammers planned and had bought an airplane ticket to send Scott to a "rehabilitation" facility called "Wellspring" which was located in a remote area of rural Ohio. Wellspring was operated by CAN Board member Paul Martin. The jury could and undoubtedly did conclude that Martin was aware of and approved the entire scope of action of the conspirators.

On the fourth day of captivity, Scott decided to feign acquiescence, in the hope that his captors would become careless and give him an opportunity to escape. Scott convinced his captors that he was ready to renounce his faith. He broke down in tears and remorse.

Scott's ploy succeeded. At the deprogrammers'

suggestion they went out to dinner to celebrate Scott's apparent conversion. Scott excused himself to go to the men's room. He ran out of the front door of the restaurant and called the police from a telephone across the street. After the police arrived, Ross contacted Landa for assistance and legal advice.

The next day, Scott was examined by a physician. At trial the physician testified that he had found a deep scratch on Scott's left knee; multiple bruises on both arms, his left thigh, and shin; and scratches on his back and knee. Scott complained that his wrists hurt and that he had a sore back and neck, intestinal problems, headaches and anxiety. According to a therapist who testified at trial, Scott suffered emotionally from the traumatic event. Moreover, Scott's relationship with his family was destroyed and remained so through the trial.

CAN's Involvement In The Deprogramming

At trial, Scott put on substantial evidence of Landa's twenty year relationship with CAN, of her authority to act on behalf of CAN, of her involvement in the deprogramming itself as CAN's agent, of CAN's ratification of her acts in the deprogramming of Scott, and of CAN's involvement in such illegal deprogramming despite its asserted policy opposing such practices. Scott made his case through the deposition testimony and cross-examination of CAN's President William Rehling, the deposition testimony of CAN's Executive Director Cynthia Kisser, the deposition testimony of CAN staffer Martin Butz, the deposition testimony of CAN Board member Paul Martin, the direct testimony of Shirley Landa, the cross-examination of Kathy Tonkin, and through the expert testimony of Anson Shupe.

In contrast, CAN barely put on a defense with regard to these important issues. The only testimony from a CAN witness during CAN's case came from William Rehling, CAN's Board President. His direct testimony takes up barely seven pages of the trial transcript. CAN's lawyers studiously avoided asking Rehling whether Landa was acting on behalf of CAN when she assisted in the deprogramming of Scott.

CAN also relied upon the testimony of Landa herself. Yet, as the district court held, "Given the numerous illustrations of Landa'[s] bias and hostility, as well as the inconsistencies in her testimony, the Court finds that the jury was entitled to disregard this testimony." Pet. at D-4.[5/] Landa admitted that she was a founder of Citizens Freedom Foundation ("CFF"), CAN's previous corporate title. CFF was founded in the mid-1970s; Scott presented substantial evidence that CFF supported and was involved with involuntary deprogrammings. Landa testified that she continued to be a member of CAN since its founding. She admitted that she had been a member of CAN's Board of Directors.

Landa testified that she has been CAN's "contact person" in the State of Washington for the last 20 years, acting on behalf of CAN concerning "alleged cult matters in Washington" and that CAN refers people to her and uses her name as a referral in Washington State. Cynthia Kisser, CAN's Executive Director, testified that Landa was CAN's

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[5/] For example, Landa testified that what she knew of Ross she learned from viewing a videotape of the show *48 Hours* which depicted one of Ross' deprogrammings. Yet, Tonkin testified that Landa and Ross were old friends, "They had talked on the phone, I believe, for years."

"contact person" for the Washington area in 1991, during the events at issue in this case.

CAN's President Rehling testified that Landa was CAN's contact person, noting, "Contact people are people who are available to be contacted to encourage communication . . . if someone needed to speak to a representative of CAN, they can deal with the contact person." He stated that contact persons act on behalf of CAN and that "[C]ontact people are authorized to represent to members of the public that they are assisting on behalf of CAN." Significantly, Rehling testified that CAN retained the authority to remove contact persons from that status for violation of policy.

When Tonkin contacted Landa, Landa identified herself as a CAN representative. Moreover, in referring Tonkin to Rick Ross for involuntary deprogramming, Landa did what had been done hundreds of prior times by CAN, its Executive Directors, employees, and its agents. Scott introduced deposition testimony from CAN national office worker Martin Butz, who staffs CAN's national hotline. Butz testified that in his position with CAN he had made hundreds of referrals to deprogrammers. Butz further testified that he made approximately a dozen referrals to Ross, even after seeing the *48 Hours* video showing Ross forcibly deprogramming a teenage boy. Rehling, the only individual put on the stand by CAN, did not know whether or not CAN regularly made referrals to Ross.

Moreover, the jury had before it handwritten letters that Ross sent to CAN executives Cynthia Kisser and Priscilla Coates soliciting deprogramming business. There were also several testimonials from CAN executives supporting Ross in this solicitation. Ross attended numerous CAN conventions, including conventions in 1985, 1990,

1991, and 1992. Among his activities at these CAN conventions, Ross met with other deprogrammers. Ross admitted at trial that he had received referrals from CAN that resulted in deprogrammings. Even CAN Board member Paul Martin, who himself runs the very deprogramming retreat to which Ross intended to send Scott, and who therefore was a co-conspirator of Ross and Landa, described Ross as someone who conducts illegal involuntary deprogramming and contrasted Ross to other deprogrammers who did not engage in Ross' tactics. This knowledge did not inhibit Martin from conspiring with Ross concerning Scott's deprogramming. Indeed, Ross admitted that in 1989 he decided to do involuntary deprogrammings and he claimed that ten percent of his deprogrammings were involuntary.

CAN asserted that in 1988 it instituted a policy against involuntary deprogramming. Scott proved that this purported policy was in fact a sham. Anson Shupe, an independent academic expert and writer on the anti-cult movement, testified without contemporaneous objection that despite CAN's public pronouncement of a policy against illegal deprogramming, in fact CAN supported such illegal deprogramming. Moreover, on cross-examination, CAN's President Rehling admitted that several CAN employees had been convicted of illegal deprogramming activities. Thus, Rehling admitted that a paid security person for CAN, Galen Kelly, who had been criminally convicted of deprogramming activities, continued to work for CAN until he was subsequently arrested for kidnaping in 1992. Moreover, CAN took no action against Landa and did not remove her from her position as Washington contact person after it learned of her participation in the illegal deprogramming of Scott.

Although CAN made the bald assertion that it had a

policy against illegal deprogramming, it introduced no evidence of internal communications on this matter and no evidence of efforts to enforce this policy among its network of contact persons and other staff and volunteers. The jury, of course, was entitled to disbelieve CAN's claim, and to find that CAN continued to support and encourage violent and illegal deprogramming through individuals such as Landa and Ross, while at the same time attempting to conceal CAN's role in them.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *Certiorari Should Not Be Granted To Review Questions Not Properly Preserved Below, Or Which Are Essentially Factual In Nature*

As we have shown, none of the questions upon which certiorari is sought were properly raised or preserved below. Thus, petitioners never raised their *Claiborne Hardware* or respondeat superior arguments in the district court by motion, evidentiary objection, requested jury instructions, or motion for a new trial. Instead, petitioners made a tactical decision to rest on their claim that Landa was not CAN's agent at all. Only on appeal did petitioners introduce arguments that it was improper to hold CAN liable for Landa's actions unless CAN directed, authorized or ratified Landa's actions, or that Landa acted pursuant to CAN's policy and practice.

The court of appeals considered these arguments only to the limited degree of determining whether the evidence supported plaintiff's claims. It had no difficulty in affirming the district court's explicit findings that CAN in fact

authorized and directed Landa's acts, that CAN had a *de facto* policy of supporting and encouraging violent deprogrammings, and that Landa acted on behalf of CAN in furtherance of that *de facto* policy.

Accordingly, CAN's petition essentially seeks review by this Court of the explicit and careful factual findings of the district court and the court of appeals, on questions that were not even directly raised at trial. It is difficult to imagine a more inappropriate effort to invoke this Court's limited discretionary jurisdiction.

This Court simply does not grant review to determine whether the district court, which of course was present at trial, and the court of appeals made factual errors. After all, "A court of law, such as [the Supreme] Court [ ], rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of errors." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 226, 275 (1949). Here, petitioner has made no showing that approaches the "obvious and exceptional" standard, and certiorari should not be granted.

2. *Petitioner's Claiborne Hardware Argument Is Both Factually and Legally Without Merit*

Relying exclusively upon a strained and overly expansive interpretation of this Court's decision in *Claiborne Hardware*, petitioner argues that "Liability can only be imposed upon a showing that there was authorization, knowledge, or ratification of the unlawful act upon which liability is based." Pet at 14. Yet nowhere in its petition

does CAN acknowledge the explicit finding of the district court:

> The Court finds that there is sufficient evidence to support the jury's finding that Ms. Landa's actions were authorized or ratified by CAN.

Pet. at D-6. See *id.* at D-6 to D-7, where the district court recited some of the evidence, "by way of example," supporting its finding.

It quite frankly is shocking that petitioner would make this argument, without pointing out to the Court the district court's findings. The significance of the district court's findings, of course, is that they reduce petitioner's argument to a factual dispute, rather than a question of law. Petitioner can prevail if and only if this Court accepts review for the purpose of examining the factual findings of jury, judge and appeals court, a purpose which we have shown is highly inappropriate. Moreover, petitioner is barred from any other legal argument premised on its *Claiborne Hardware* analysis because it never raised the issue below.

In any event, petitioner reads too much into *Claiborne Hardware*, positing it as imposing a broad new rule limiting the liability of "an organization that engages in constitutionally protected associational and speech activity." Pet. at 13. Such a rule, of course, would be boundless, since virtually every organization, including ordinary business corporations, engage in such protected activity. Certainly nothing in *Claiborne Hardware*, or in any other subsequent case, suggests that this Court intended to impose a revolutionary new rule prohibiting imposition of vicarious liability for the unprotected acts of all organizations that

otherwise may engage in protected speech or association.

Indeed, in *Claiborne Hardware* the Court made it clear that "The NAACP – like any other organization – of course may be held responsible for acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified." 458 U.S. at 930 (citing *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982)).

Here, even though CAN never argued a defense or requested jury instructions based on *Claiborne Hardware* at the district court level, the judge's instructions to the jury and the evidence before the jury nevertheless met the standard set forth in *Claiborne Hardware*. Thus, *Claiborne Hardware* specifically permits liability for the acts of agents "that are undertaken within the scope of their actual or apparent authority." *Id.* Here, the jury instruction virtually tracked this requirement, as it provided:

> If you find that Shirley Landa was the agent of CAN and was acting within the scope of authority, then any act or omission of Ms. Landa was the act or omission of CAN. If you find that Ms. Landa was not acting within the scope of authority as CAN's agent, then you must find for CAN.

The evidence proved that Landa was acting fully within the scope of her authority. She was the Washington State contact person for CAN. According to CAN's President Rehling, "[C]ontact people are authorized to represent to members of the public that they are assisting on behalf of

CAN." Moreover, Scott demonstrated that CAN's asserted policy against illegal deprogramming was a sham. Indeed, Scott proved that CAN's national office itself hired individuals it knew to be illegal deprogrammers and made referrals to Rick Ross, even though both CAN's Board member Paul Martin and Ross himself acknowledged that Ross engaged in illegal deprogramming.

Claiborne Hardware also permits CAN to "be found liable for other conduct of which it had knowledge and specifically ratified." 458 U.S. at 930. Such knowledge and ratification was proven here. As the district court held, "CAN admitted to its control and supervision of its contact persons. CAN officials stated that these persons could be removed for violation of policy. However, Ms. Landa was not removed for violation of policy and remains a CAN contact person." Pet. at D-6.

Scott therefore demonstrated CAN's liability for Landa's actions under both sets of circumstances permitted under *Claiborne Hardware*: (1) Landa was an agent of CAN's acting within the scope of her authority, including in her participation in illegal deprogramming and (2) CAN authorized and ratified Landa's actions.

CAN relies heavily upon Judge Kozinski's dissent from the order rejecting the suggestion for rehearing *en banc*. With due respect, Judge Kozinski's concerns are based upon an exaggerated reading of an erroneous media report and not upon evidence in the record here. Not having been on the panel which thoroughly reviewed the district court record and the findings of the trial judge, Judge Kozinski evidently was unaware of the district court's explicit finding that CAN in fact did authorize or ratify the acts of its agent Landa, or of the substantial evidence supporting not only that finding but also the panel's

conclusion that Landa acted pursuant to CAN's *de facto* policy and practice (in contradistinction to its bogus "official" policy).[6/]

Finally, that CAN is a not-for-profit organization or that Landa was a volunteer does not relieve CAN of liability for her actions. The Court in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), held a not-for-profit professional association liable for treble antitrust damages for the acts of a volunteer where the volunteer acted with apparent authority for the association. The Court noted that the association was in the best position to prevent further violations and held, "the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for [plaintiff's] antitrust injuries." *Id.* at 576. Notably, the Court in *Claiborne Hardware* relied upon the *ASME* case when it stated that, "The NAACP – like any other organization – of course may be held responsible

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[6/] As to Judge Kozinski's concern that the judgment in this case forced CAN into bankruptcy, it was CAN itself which filed for Chapter 11 reorganization and then voluntarily sought to convert the proceeding to a Chapter 7 liquidation, which CAN then successfully moved to dismiss. As the Seventh Circuit explained in an appeal arising out of CAN's bankruptcy, "This proceeding was a Chapter 7 liquidation . . . When the Cult Awareness Network chose to avail itself of Chapter 7 liquidation in order to have its (very substantial) debts forgiven, it forwent any realistic opportunity to control the disposition of the estate." *Cult Awareness Network* v. *Martino*, 151 F.3d 605, 609 (7th Cir. 1998). CAN plainly is not "out of business," as evidenced by the very fact that it is petitioning for redress here. Indeed, the Chapter 7 liquidation was dismissed and CAN continues to operate under the same leadership as before.

for acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." 458 U.S. at 930.

Because CAN's arguments here were not presented to the district court they are not appropriate for certiorari. Moreover, because stripped away from their repackaging, they are essentially arguments concerning the factual sufficiency of the evidence submitted below, and because the jury's decision was upheld after an independent review of the evidence by both the district court and the court of appeals panel, certiorari is not proper here.

3. *CAN's Argument That 42 U.S.C. §1985(3) Precludes Respondeat Superior Liability Is Not Only Incorrect But Irrelevant, Since CAN Was Found Liable For Its Policy and Practice*

CAN's argument that the court of appeals' decision conflicts with other precedent which holds that there can be no vicarious liability for a civil rights conspiracy under 42 U.S.C. §1985(3) is without merit and provides no basis for granting certiorari here. In any event, however, CAN's assertion is irrelevant, since the court of appeals explicitly found that CAN's liability under 42 U.S.C. §1985(3) is independently established under a theory of policy and practice liability. Once again, CAN's petition amounts to nothing more than a plea that the Court grant certiorari to review factual findings.[7/]

[7/] CAN cannot properly request that the Court determine that the policy and practice issue was not properly instructed to the jury, since CAN never raised the issue or requested a jury

CAN concedes that liability is proper where it can be shown that it was CAN's policy and practice to encourage illegal deprogramming. CAN contends that the evidence at trial was insufficient to demonstrate "any policy or practice of CAN knowingly referring persons to deprogrammers who engaged in *illegal* deprogrammings such as the one to which Mr. Scott was subjected." Pet. at 23-24 (emphasis in original). At trial, however, Scott demonstrated that CAN did indeed have a policy and practice of referring individuals to deprogrammers who it knew engaged in involuntary, illegal deprogramming. This included evidence that CAN made regular referrals to Ross, who was acknowledged by CAN Board member Paul Martin to engage in illegal deprogramming, as well as the testimony of Anson Shupe showing that CAN's public statements that it opposed illegal deprogramming were a farce.

This evidence established CAN's liability under cases such as *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which held that municipalities may be held liable under 42 U.S.C. §1983 for the acts of a municipal employee acting pursuant to a municipal policy or practice. Here, Scott proved that, in the words of the court of appeals panel, "Landa acted in accordance with CAN's practice of referring people to involuntary deprogrammers" (Pet. at A-14), and therefore CAN is liable for Landa's actions.

It is therefore unnecessary for the Court to consider CAN's further contention that the panel's decision finding

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instruction at trial. Thus, CAN's petition necessarily is limited to the issue of whether the court of appeals erred in finding more than sufficient evidence in the record of CAN's *de facto* policy and practice of supporting and encouraging violent deprogramming.

CAN liable for conspiracy to violate Scott's civil rights under 42 U.S.C. §1985(3) conflicts with other precedent which, as CAN characterizes it, holds that there is no respondeat superior liability under §1985(3).

In any event, CAN's effort to portray a circuit conflict on the question is inaccurate. CAN completely disregards the dispositive distinction that the limitation on respondeat superior liability under §1983 derives from the language of §1983 itself, not present in §1985(3), and upon limitations on municipal liability which are not present in this §1985(3) action against a non-municipal defendant.[8/] As such, there is no basis for CAN's assertion and no grounds for granting certiorari here.

In *Monell* the Court held that a municipality may not be held liable under 42 U.S.C. §1983 for the actions of its employees solely under a theory of respondeat superior. The Court's holding was rooted in the language and legislative history of §1983 and is not applicable to §1985(3) claims against non-governmental entities. *See id.* at 691 ("[T]he language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

The *Monell* Court began with a close reading of the

[8/] That §1985(3) has a different scope and focus than §1983 was, of course, the basis for the Court's decision in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), holding that §1985(3) does not encompass the state action limitations of §1983; "it is almost impossible to believe that Congress intended in the dissimilar language of the portion of §1985(3) now before us, simply to duplicate the coverage of," *inter alia*, §1983. *Id.* at 99.

original text of §1983. The Court explained that the statute "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692. The Court further held, however, that the "cause to be subjected" language of the statue precluded awarding damages on a respondeat superior theory of liability. Thus, the Court interpreted the term "cause" as it was used in §1983 so as to prohibit liability solely under the doctrine of respondeat superior.

"[E]qually important" to the *Monell* Court's analysis was Congress' understanding at the time of the act that federal imposition of respondeat superior liability on *municipalities* "would have raised all of the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Id.* at 693. The Court's interpretation of the legislative history bolstered its conclusion that Congress did not intend §1983 to permit damages under a respondeat superior theory of liability against a *municipality*.

Neither of the grounds for the decision in *Monell* is applicable to a claim under §1985(3) to a private defendant, as presented here. The language of §1985(3) is substantially and materially different from the language of §1983,[2/] and

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[2/] Under §1985(3) the operative question is whether the defendants "conspire[d]" to deprive plaintiff of his rights. This is in contrast to claims under §1983 in which the relevant question is whether a state actor "cause[s]" a person "to be subjected to" such a deprivation. Thus, the interpretation of the term "cause," which *Monell* held precluded municipal liability under the respondeat superior doctrine, is irrelevant to this aspect

the concerns of Congress regarding the constitutional limitations on imposing liability on a municipality are wholly inapplicable to non-governmental defendants such as CAN.[10/] As the court of appeals noted, "The policy and practice limitation on municipal liability under §1983 shields governmental agencies from liability for unauthorized actions of its officers to a greater extent than traditional respondeat superior principles do; given this, to replace traditional principles of vicarious liability [exclusively] with a 'policy and practice' theory of liability with respect to private actors strikes us as suspect." Pet. at A-13.

CAN ignores the dispositive distinction, made in the cases it cites and by the panel, between governmental defendants and non-governmental defendants. Thus, seven of the eight cases cited by CAN for the proposition that there is no respondeat superior liability under §1985(3) concerned municipal defendants.[11/] Only one of CAN's cases, and that

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of conspiracy liability under §1985(3).

[10/] Indeed, §1985(3) originally was directed at the Ku Klux Klan. It would be anomalous indeed to hold that Congress' reluctance to hold municipalities vicariously liable for the acts of their agents under §1983 extended as well to the very organ of private violence at which §1985(3) was directed.

[11/] *See Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1272 (7th Cir. 1984) (county of Milwaukee not liable under 42 U.S.C. §1985 for actions of district attorney unless district attorney acted pursuant to custom, practice or policy); *Owens* v. *Haas*, 601 F.2d 1242, 1247 (2d Cir.) *cert. denied*, 444 U.S. 980 (1979) (county could not be liable for acts of prison guards pursuant to 42 U.S.C. §1985 under a respondeat superior theory); *Adams* v. *Pate*, 445 F.2d 105, 107 (7th Cir. 1971) (dismissing claims und[illegible]

a district court case, actually concerned the liability of a non-governmental actor, which was alleged to have conspired with a municipality. *Hankins* v. *City of Philadelphia*, 1998 U.S. Dist. LEXIS 5101 (E.D. Penn. Apr. 9, 1998). In *Hankins*, however, the *holding* upon which the court granted summary judgment dismissing the plaintiff's §1985(3) claim was that, as a factual matter, "plaintiff has not remotely sustained a claim of racial discrimination" or "racial animus," against *any* defendant or defendant's agent. *Id.* at 5138. It was only in a passing dicta in a footnote that the court conclusorily stated, without the slightest discussion or analysis, that "There is no respondeat superior liability under §1985(3)," relying again on cases involving *municipal* defendants. *Hankins*, thus, provides no reasoned basis for a grant of certiorari here.

Thus, CAN's contention that the Ninth Circuit's

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42 U.S.C. §§1983 and 1985(3) against prison warden); *Carnegie* v. *Miller*, 811 F. Supp. 907, 914 (S.D.N.Y. 1993) (dismissing §1985(3) claims against municipal defendants); *Howard* v. *Topeka-Shawnee County Metro. Planning Comm'n*, 578 F. Supp. 534, 538 (D. Kan. 1983) (dismissing §1985 claims against local planning commissions); *Westinghouse Broadcasting Co.*, v. *Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (denial of TRO application, stating there is no vicarious liability pursuant to 42 U.S.C. §§1983 and 1985(3) for actions of government officials); *Luke* v. *Abbott*, 954 F. Supp. 202, 202 n. 1 (C.D. Cal. 1997) (stating "*Monell* municipal liability doctrine" applies to claims under §1985 brought against county); *Meza* v. *Lee*, 669 F. Supp. 325, 326 (D. Nev. 1987) (dismissing §1983 claim against City and police of Reno); *Vazquez* v. *City of Reno*, 461 F. Supp. 1098, 1102 (D. Nev. 1978) (dismissing §1986 claim because municipality could not be liable under respondeat superior liability theory).

decision conflicts with other precedent is based entirely on CAN's failure to acknowledge the dispositive distinction between cases brought under §1983 against municipal defendants and this case brought under §1985(3) against a private defendant. Because there is no genuine conflict among the cases, there is no basis for granting certiorari.

4. *This Is Not an Appropriate Case for Determining the Limits of Class-based Discriminatory Animus under §1985(3)*

CAN argues that class-based animus against a religious group is not a valid predicate for liability under §1985(3). CAN "acknowledges that the Ninth Circuit did not pass upon the question whether a religious based animus can support a Section 1985(3) claim," (Pet. at 27), but fails to note that CAN *never raised this argument* until it sought rehearing *en banc* on appeal. The court of appeals properly ignored CAN's belated effort to raise the issue. Because it is a firmly established principle that, "[w]here issues are neither raised before nor considered by the Court of Appeals, [the Supreme] Court will not ordinarily consider them," CAN's petition for certiorari should not be granted here. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the Court were to consider CAN's belated attempt to raise the question, there is no reason for the Court to reach out to decide the issue on this petition. Relying upon *Word of Faith World Outreach Center Church, Inc.* v. *Sawyer*, 90 F.3d 118 (5th Cir. 1996), CAN claims that a conflict in the circuits exists on the question whether class-based religious animus is grounds for liability under 42 U.S.C. §1985(3). In *Sawyer* the Fifth Circuit, conclusorily stated, without analysis, that only a conspiracy based on

racial animus is sufficient for liability under §1985(3). 90 F.3d at 124. The holding of every other circuit to have considered the question is to the contrary. *Compare Life Insurance Co. of N.A.* v. *Reichardt*, 591 F.2d 499, 505 & n.15 (9th Cir. 1979) (class-based religious animus is sufficient under §1985(3)); *Colombrito* v. *Kelly*, 764 F.2d 122, 130 (2d Cir. 1985); *Taylor* v. *Gilmartin*, 686 F.2d 1346, 1357-61 (10th Cir. 1982) *cert. denied*, 459 U.S. 447 (1983); *Ward* v. *Connor*, 657 F.2d 45, 48 (4th Cir. 1981) *cert. denied*, 455 U.S. 907 (1982).

The Fifth Circuit's conclusory statement does not reflect any considered analysis of precedent or of the statutory history of §1985(3) sufficient to justify this Court's plenary review of a question that otherwise seems settled among the circuits. Thus, in *Sawyer*, the Fifth Circuit merely cites its earlier decisions,[12/] which in turn purport to rely

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[12/] The earlier Fifth Circuit cases cited in *Sawyer* also do not reflect an analysis of the question whether a class based animus, such as religion, would qualify as a predicate to §1985(3) liability. *Sawyer* cited to *Green* v. *State Bar of Texas*, 27 F.3d 1083, 1088 n.8 (5th Cir. 1994), *Deubert* v. *Gulf Federal Savings Bank*, 820 F.2d 754, 757 (5th Cir. 1987) and *Rayborn* v. *Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1985). In *Green*, the plaintiff alleged that defendants engaged in a conspiracy to interfere with plaintiff's business, because he was African-American. The *Green* court rejected his claim merely on the basis that he failed to allege that defendant's actions were motivated *solely* by race. The Court made no statement that other forms of class based animus could not be reached under §1985(3).

The other cases relied upon by *Sawyer* similarly do not definitively hold that animus under §1985(3) is limited to racial animus. Thus, *Rayborn* concerned an economically based

upon the Court's decisions in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) and *United Brotherhood of Carpenters and Joiners of America* v. *Scott*, 463 U.S. 825 (1983). But *Griffin* did, "not decide, given the facts of [that] case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of §1985(3)," 403 U.S. at 102, n.9. Rather, it left open the possibility that liability may exist where there is some "otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. Likewise, although *Scott* held that §1985(3) does not encompass conspiracies that arise out of an animus based on economic views, it too declined to decide whether conspiracy motivated by an invidiously discriminatory intent other than racial bias would be actionable under §1985(3).

Cases that have thoroughly considered the matter have concluded that religiously based animus is a proper ground for liability under §1985(3). Thus, in *Life Insurance*

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conspiracy; the court properly held that the claim was barred by the Court's decision in *United Brotherhood of Carpenters* v. *Scott*, 463 U.S. 825 (1983). *Rayborn's* statement that "[t]he conspiracy must be race based to state a cause of action for violation of §1985," 776 F.2d at 532, in context, did not purport to be a definitive holding on the limits of §1985(3). Similarly, in *Deubert*, also cited in *Sawyer*, the court conclusorily stated that it was "well established" in the Fifth Circuit that "the only conspiracies actionable under §1985(3) are those motivated by racial animus," relying upon *Rayborn*, as well as *Daigle* v. *Gulf State Utilities Co.*, 794 F.2d 974, 978-79 (5th Cir. 1986) *cert. denied*, 479 U.S. 1008, which concerned animus based upon the plaintiff's status as a "scab," which the court held was indistinguishable from the economically based animus held not actionable by *United Brotherhood of Carpenters*.

Co. of N.A. v. *Reichardt*, 591 F.2d 499, 505 & n.15 (9th Cir. 1979), the Ninth Circuit held, "Section 1985's drafters clearly intended to protect groups other than oppressed southern blacks. The congressional debates evinced concern for all groups subject to the organized lawlessness of the Ku Klux Klan, including all Unionists, Republicans, and certain religious groups."

More recently, in *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993), the Court again did not specifically answer the question whether animus other than racial animus was sufficient but stated:

> The nature of the 'invidiously discriminatory animus' *Griffin* had in mind is suggested both by the language used in that phrase ('invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating.' Webster's Second International Dictionary 1306 (1954)) and by the company in which the phrase is found ('there must be *some racial or perhaps otherwise class-based*, invidiously discriminatory animus').

506 U.S. at 274 (citing *Griffin*).

Plainly, the animus demonstrated here, based as it was in an objection to Scott's participation in a fundamentalist Pentecostal church, meets the standard of "invidiously discriminatory animus" formulated in *Bray*. A grant of certiorari to address this question, not presented below, is not appropriate here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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